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# Freedom of Information Checklist

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# INTRODUCTION

**The checklist that follows sets out some of the questions that may be helpful in assessing the government's forthcoming white paper on freedom of information, expected in December 1997.**

A Freedom of Information (FOI) Act establishes a general right of access by the public to information held by government and other public bodies. Such laws are subject to various exemptions and enforced by an independent body with the power to order disclosure.

An effective Freedom of Information Act may lead to more informed public discussion of policy, greater testing of the facts before decisions are taken and more opportunity for outside experts to scrutinise data previously available only to government insiders. It may also encourage greater honesty in government, if only to avoid being shown up if the documents emerge later on. It should make it harder for ministers - should they be tempted - to follow the approach implied by the former Foreign Secretary, Lord Howe, who told the Scott inquiry *"there is nothing necessarily open to criticism in incompatibility between policy and presentation of policy...[government] is not necessarily to be criticised for a difference between policy and presentation of policy"*.

An FOI Act may be of particular value to the individual. It may help people learn what is recorded on personal files about them, and correct damaging errors. It should require authorities to publish the internal guidance used by officials, so people can check that their benefit claim or planning application is being dealt with in accordance with proper procedures. Information about developments affecting the local community may become available earlier, providing greater opportunity to influence them. More information about environmental and safety hazards, and the regulatory bodies' responses to them, should also be available. Information alone may not be enough to influence such matters, but it is always a basic prerequisite. FOI may sometimes even save money, helping to expose waste or the implausibility of flawed projects. But at the end of the day, whether or not these benefits occur, the justification for this reform is simply stated. What the government does is not its own private affair. It is the *public's* business, done on our behalf, and we are entitled to know about it.

That principle has been recognised all over the world. FOI laws exist in the USA, Canada, Australia, New Zealand, France, Denmark, Holland, Sweden, Norway, Hungary and Ireland. Other governments now committed to FOI legislation include those of Japan, South Korea, Fiji and Uganda.

In the UK, some progress was made in 1994 when the Conservative government introduced the Open Government code of practice<sup>1</sup>. This commits government departments and agencies to releasing information on request unless it falls within specified exemptions. A parallel code for NHS bodies such as trusts and health authorities, was introduced in 1995<sup>2</sup>. The codes have some of the features of an FOI Act: they establish a general right of access subject to specific exemptions, with complaints going to an independent person, the Parliamentary Ombudsman and the Health Service Ombudsman respectively. But the codes have no legal force. Authorities cannot be forced to comply with the Ombudsmen's recommendations, although so far they have generally done so.

The code's lack of legal standing also means that they cannot override the 250 or so statutory restrictions that prevent the disclosure of safety and other information. There are other limitations. Only bodies within the jurisdiction of the Parliamentary and Health Service Ombudsmen are covered. Bodies such as the police, local authorities, nationalised industries, and any number of quangos are outside their scope. Finally, they do not require authorities to release actual *copies* of documents. Code requests are intended to be met with a letter summarising the relevant information instead, raising the fear that inconvenient details may be edited out. In practice, thanks to the Ombudsman's intervention, documents are in fact often disclosed.

The codes have been relatively little known about or used. But they have added to the pressure for more openness, and allowed a few determined enquirers to prise information out of conspicuously unhelpful bodies. However, the relatively small number of complaints to the Parliamentary Ombudsman (only 44 were received in 1996, more than half of which were not formally investigated) has limited the code's usefulness. Its impact has also been blunted by the fact that Ombudsman enquiries now take almost a year on average, and sometimes more than two. Nevertheless, the codes have helped to prepare Whitehall for

<sup>1</sup> The Code of Practice on Access to Government Information

<sup>2</sup> Code of Practice on Openness in the NHS

FOI. Every department now has its own open government co-ordinator, there is a central monitoring unit in the Cabinet Office, and annual progress reports are published. We are not, therefore, starting from scratch.

Nor is the Labour government. Labour has been committed to Freedom of Information for well over 20 years; the promise to legislate featured in its election manifestos of 1974, 1979, 1987, 1992 and 1997. In 1992, the Labour front bench introduced the *Right to Information Bill*. The following year Mark Fisher MP's *Right to Know Bill* was debated in the Commons for 21 hours. Labour leaders - Neil Kinnock, John Smith and Tony Blair - have all pledged their personal support. Speaking at the Campaign for Freedom of Information's Awards in 1996 Mr Blair described the reform as "*absolutely fundamental to how we see politics developing in this country over the next few years*" which would signal "*a culture change that would make a dramatic difference to the way that Britain is governed*". Such comments suggest that our expectations should be high.

No FOI Act produces, or even aspires to, complete openness. The existence of exemptions by definition acknowledges that some information will be withheld. The real impact may depend on many factors: the small print of the exemptions; whether charges are made for information; the vigour of the appeals body; and whether ministers are positive towards or resentful of the legislation. A weak Act with broad exemptions, high charges and slow procedures will do little for the citizen or accountability. But an Act which gives the benefit of the doubt to the individual, not the politician or administrator, could be a powerful instrument for change. A government which introduces and then respects such a right, may in return earn the respect of the public.

*So what kind of Act are we likely to get? The checklist that follows suggests some of the points to look for.*

# CHECKLIST

## ***THE BODIES COVERED***

- **Will the FOI Act apply to all central government bodies?**

It should apply to (a) all government departments (b) agencies (c) regulatory bodies (d) advisory bodies (e) quangos (f) nationalised industries and public corporations (g) the courts (h) publicly funded educational bodies (i) bodies set up by statute or Royal Charter and supported from public funds (j) other bodies carrying out public functions.

- **Will it apply to local bodies?**

The police, NHS bodies and local authorities (and bodies under their control, such as schools) are amongst those that should also be covered. Although local authorities are already required to meet in public, the existing legislation on access to meetings is not a substitute for an FOI Act. Given the importance of the services they provide, bringing them under the Act would be a particularly welcome move.

- **Will it apply to commercial bodies exercising public functions?**

The Act should apply to information held by private bodies undertaking contracted-out functions. These are still public services paid for by public funds.

A bolder approach would be to extend it to the privatised utilities, particularly those still operating as monopolies. The absence of competition and consumer choice in these essential areas continues to cause public concern; while the complex regulatory structure to which they are subject distinguishes the utilities from genuine private sector bodies. The courts have held the water companies to be ‘emanations of the state’<sup>3</sup> suggesting that such utilities could properly be expected to comply with a measure designed to improve public sector accountability.

- **Are the security and intelligence agencies covered?**

They should be, particularly as MI5 is increasingly undertaking tasks not involving national security, such as the investigation of fraud and computer security in Whitehall. The CIA is subject to the US FOI Act, and its Canadian and New Zealand counterparts are also covered by their countries’ FOI laws. Exemptions for national security, international relations, law enforcement and harm to the safety of

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<sup>3</sup> Griffin & others v South West Water Services Ltd [1995] IRLR,15

individuals should adequately protect genuinely sensitive aspects of their work, while allowing access to other information.

## ***THE INFORMATION COVERED***

- **Will the Act apply to information recorded in the past?**

It should - information recorded in the past may be essential to understanding current policies and problems. If earlier information is not covered, all information *now* in official files will be permanently excluded from access.

- **Will people be able to obtain information in the form they want it?**

The Act should allow people to obtain copies of actual records, whether on paper or other forms, such as computer disks. But they should also be able to ask questions and have them answered, if that is what they prefer. It should not be possible to refuse a request if the information is *known* to officials, but not *recorded* on file. This would encourage officials not to keep proper records.

- **Will authorities be required to publish guidance to help the public - both on paper and the Internet?**

Authorities should be required to (a) publish guidance explaining out their own arrangements for implementing the Act; (b) describe the kinds of records they hold, so people will know what exists (c) give the public direct access to their own indexes of records (where these do not reveal exempt information) (d) publish lists of records disclosed under the FOI Act, so people can learn what may be available from these examples.

This material should also go on the Internet, along with - where practical - actual copies of records released under the Act. This will allow everyone, not just the individual requester, to benefit from disclosures, reinforcing the Act's public interest purpose. This has recently become a requirement under the US FOI Act.

Authorities should also have to publish their internal guidance used in dealing with the public and businesses. This is a requirement under the Open Government code.

- **Will the Act apply to old files waiting disclosure in the Public Record Office?**

The best solution would be a seamless right of access covering both current and historical records. Decisions to withhold old records would have to be justified under the Act's exemptions and could be challenged under its appeals process.

- **Will the 30-year period for public records be cut?**

It should be. Canada has a 20-year rule; under Ireland's new FOI Act cabinet papers are only exempt for only 5 years. If cutting the 30-year period would be expensive, because of the greater volume of records to be vetted, it could initially be reduced for limited classes of records only - such as cabinet minutes - whose volume is small.

## ***ENFORCEMENT***

- **Will the Act be enforced by a Commissioner with powers to compel disclosure?**

The courts are not suitable for enforcing FOI - the cost would be prohibitive for most applicants. The ideal solution would be a Commissioner with the power to make legally binding orders. Individuals would not need to be legally represented, so they would have no costs. The Commissioner could mediate informally, where this would speed things up. But where he or she made an order, an authority would have to comply. Failure to do so should be treated as contempt of court.

A Commissioner with binding powers is used in the FOI laws of British Columbia and Ontario in Canada and in Queensland and Tasmania in Australia. A UK parallel can be found in the role of the Pensions Ombudsman whose rulings, under the Pensions Schemes Act 1993, are "final and binding" and can be challenged only by appeal on a point of law to the High Court.<sup>4</sup>

- **Will ministers still have the last word?**

Ministers should not be able to override the Commissioner's orders in any circumstances. However, if a minister - or anyone else - thought the Commissioner had erred, they should be able to appeal either to a tribunal or to the courts.

- **Will it be an offence to shred requested records?**

It should be. The deliberate destruction of requested records has proved a real problem overseas. Canada's Information Commissioner originally argued that public servants would never do this. Now he says he was "naive" and calls his country's FOI law "toothless" because it fails to penalise the shredding of records.

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<sup>4</sup> Pensions Schemes Act 1993, sections 151(3) and (4).

## ***FEES***

- **Will the Act prevent authorities charging potentially prohibitive fees for information?**

Authorities may want to charge, to protect themselves from excessive requests. This would deter many legitimate users and discriminate in favour of businesses - who will usually be able to pay. It would be better to allow authorities to refuse unreasonably vast requests, subject to proper safeguards.

If fees are charged (a) there should be no application fees (these would mean people having to pay under FOI for information that is presently free); (b) charges should only apply after a generous amount of free time had been spent on the request (c) differential charges, with fees for commercial users but not for individuals, voluntary groups or the media, should be considered (d) fees should be waived for requests in the public interest.

## ***DELAYS***

- **Are firm timetables laid down for providing information?**

Authorities must be required to release information within a fixed period of time, of perhaps 3 or 4 weeks, but they should not wait that long where they can respond more quickly. Some additional period may be needed where an outside body which has provided the relevant information may need to be consulted - but this should be clearly limited.

- **If an internal review process is permitted, is it subject to a strict time-limit?**

Some FOI laws require complainants to go through a stage of internal review before they approach the appeals body. This gives the authority itself a chance to reconsider its original decision at a higher level. The fact that a more senior official, with greater authority to change past practice, is involved sometimes leads to information being released. But where an authority is determined to resist disclosure, internal review simply adds to the delays. There should be a fixed, short period for this process. Applicants should be free to complain to the appeals body if no decision has been reached by the end of this period.

## ***EXEMPTIONS***

- **Will all exemptions be based on “harm tests”?**

Authorities should only be able to withhold information if they can show that releasing it would *harm* a specified interest, such as defence, security, law enforcement, commercial confidentiality or privacy. Information should not be withheld merely because it *relates* to such a matter, or because it has been provided to the authority “in confidence”. This would allow the authority and submitter to agree between themselves to deny information to the public. All exemptions should explicitly require that harm would occur if the information was released.

- **Are all exemptions subject to a “public interest override”?**

This would allow the public interest in disclosure to be weighed against the possible harm of releasing exempt information. It would prevent exemptions becoming an inflexible obstacle to disclosure, regardless of the circumstances. For example, information which could harm a company’s commercial secrets would normally be exempt. But if it showed a substantial health hazard or serious malpractice, it could be disclosed under a public interest provision.

This important principle already applies to most exemptions under the Open Government code of practice, including those on defence, national security, law enforcement and commercial confidentiality. It should be central to an FOI Act.

- **Are all exemptions *discretionary*?**

Exemptions should *allow* authorities to withhold information, but not *compel* them to do so. Compulsory exemptions would stop authorities disclosing information even if they wanted to. They could produce *more* secrecy than previously existed.

- **Does the FOI Act’s right of access override existing secrecy provisions?**

Some 250 laws currently *prohibit* the disclosure of certain information. Medicines licensing officials commit an offence if they release safety information which they have obtained from pharmaceutical companies. The Health and Safety Executive says it is prohibited by law from making public information about hazards at particular premises unless it is given to someone directly at risk. An FOI Act should override these restrictions.

- **Will the Official Secrets Act be amended to avoid potential conflict with the FOI Act?**

The Official Secrets Act (OSA) 1989 could in theory co-exist with an FOI Act. The OSA only penalises *unauthorised* disclosures of information. A civil servant properly releasing information under the FOI Act would by definition be authorised, and not be committing an offence.

However, an official who *leaked* information, or a journalist who published leaked information, might commit an offence even though the same information could be obtained under the FOI Act. This is because the OSA's classes of protected information are unlikely to dovetail precisely with an FOI Act's exemptions. A mismatch is particularly likely if an FOI Act contains a public interest override since there is no corresponding public interest provision under the OSA. Such discrepancies would strengthen the case for amending the OSA - and in particular for creating a public interest defence. Labour promised such a reform at the time the 1989 Act was introduced.

## ***POLICY ADVICE***

- **Will the Act provide access to some civil service policy advice and discussion?**

Some internal discussions within government may need to be confidential, where disclosure would genuinely interfere with the ability to develop policy. This could be the case if frank assessments of how key players are likely to react to proposals, and tactics for handling them, were disclosed. Equally, making public untested proposals thrown up during the early stages of discussions, before those involved have been able to consider whether they are feasible or desirable, could inhibit such discussions.

But the release of other kinds of internal discussion, such as considered assessments of the implications of particular proposals, the reasons why particular options were chosen, or expert analysis of technical data, would improve public understanding without undermining decision-making. Knowledge that such material may become public may even improve it by encouraging a more rigorous and balanced approach to policy analysis.

- **What form will any policy advice exemption take?**

- (a) Advice and internal discussion could generally be withheld until a decision has been taken, but released afterwards. This is the approach under New

Zealand's FOI law. This does not mean it would be too late to be made use of. For example, a decision announced in a white paper might be accompanied by access to the preceding analysis, which would be available during any consultation period.

- (b) Even after a decision, internal discussion could still be withheld if its disclosure at that point would have such an inhibiting effect on the frankness of future discussions that decisions would be damaged. That requires a more substantial effect than merely toning down particularly outspoken remarks.
- (c) In either of the above cases, the public interest in openness should also be taken into account and material released where the balance favours openness. A similar test applies to internal advice under the UK's Open Government code and is used under the Australian and New Zealand FOI laws.
- (d) Factual analysis and expert advice on a technical issue should not fall within the exemption at all, and should normally be available. Material of this kind is unlikely to be inhibited by disclosure. The prospect of it being seen by professional colleagues outside government is likely to ensure that technical or scientific judgements are not influenced by political considerations.

The potential benefits of greater disclosure have been described by the the former premier of Victoria in Australia:

*“FOI is a bit like a compulsory random breath test on our roads. Motorists are aware of its presence and the ever-present likelihood of a check. Governments, likewise, are aware of the prospect of examination of a comprehensive list of documents on which a decision is based. Because of that the Act has had a significant impact on the quality of decision making. It has improved the public sector's professionalism and the capacity of its officers to develop, analyse, and articulate policy that stands up to scrutiny.” [John Cain, Freedom of Information Review, No 58, August 1995]*

The New Zealand Law Commission, in a recent report, concluded:

*“Since 1982 there has been a fundamental change in attitudes to the availability of official information. Ministers and officials have learned to live with much greater openness. The assumption that policy advice will eventually be released under the Act has in our view improved the quality and transparency of that advice.” [Review of the Official Information Act 1982, October 1997]*

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